United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

37-1

785

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

ANTONIO R. GARCIA	)	
	)	
Appellant	)	
	)	
v.	)	Case No. 22653
	)	
UNITED STATES OF AMERICA	)	(Cr. 1010-68)
	)	
Appellee	)	

BRIEF OF APPELLANT

JOSEPH F. HENNESSEY
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Washington, D. C. 20006

Appointed By This Court

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STATUTES INVOLVED

Title 22, Section 1801(b) of the D. C. Code, as amended.

"Except as provided in subsection (a) of this section, whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling, bank, store, warehouse, shop, stable, or other building or any apartment or room, whether at the time occupied or not, or any steamboat, canal-boat, vessel, or other watercraft, or railroad car or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be guilty of burglarly in the second degree. Burglary in the second degree shall be punished by imprisonment for not less than two years nor more than fifteen years."

Title 22, Section 2201 of the D. C. Code, as amended.

"Whoever shall feloniously take and carry away anything of value of the amount or value of $100 or upward, including things savoring of the realty, shall suffer imprisonment for not less than one nor more than ten years."

Title 18, Section 1073, United States Code Annotated.

"Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for a crime, or an attempt to commit a crime, punishably by death or which is a felony

under the laws of the place from which the fugitive flees, or which, in the case of New Jersey, is a high misdemeanor under the laws of said State, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by death or which is a felony under the laws of such place, or which in the case of New Jersey, is a high misdemeanor under the laws of said State, is charged, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed, or in which the person was held in custody or confinement and only upon formal approval in writing by the Attorney General or an Assistant Attorney General of the United States, which function of approving prosecutions may not be delegated."

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 7. The Indictment and the Information

* * *

"(f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such later time as the court may permit. A bill of particulars may be amended at any time subject to such condition as justice requires."

Rule 16. Discovery and Inspection

"(a) Defendant's Statements; Reports of Examinations and Tests; Defendant's Grand Jury Testimony. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, (2) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and (3) recorded testimony of the defendant before a grand jury.

(b) Other Books, Papers, Documents, Tangible Objects or Places. Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, upon a showing of materiality to the preparation of his defense and that the request is reasonable. Except as provided in subdivision (a) (2), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal government documents made by government agents in connection with the investigation or prosecution of the case, or statements made by government witnesses or prospective government witnesses (other than the defendant) to agents of the government except as provided in 18 U.S.C. § 3500."

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ANTONIO R. GARCIA	)	
	)	
Appellant	)	
	)	
v.	)	Case No. 22653
	)	
UNITED STATES OF AMERICA	)	(Cr. 1010-68)
	)	
Appellee	)	

BRIEF OF APPELLANT

Antonio R. Garcia, appellant herein, by his Court appointed attorney, herewith respectfully submits his Brief in the above-captioned appeal.

Jurisdictional Statement

On April 23, 1968, the Grand Jury returned an indictment against Donald F. White and Antonio R. Garcia for violations of Title 22, Sections 1801(b) [1/] and

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1/ The language of Title 22, Section 1801(b) of the D. C. Code, as amended, has been fully set forth (see page (v)) and will not be repeated here.

2201[2] of the D. C. Code, offenses of second degree burglarly and grand larcency[3], respectively (R. 1).[4] After trial before a jury on November 7, 12, 13, and 14, 1968, a verdict of guilty was returned as to appellant on all four counts of the indictment (R. 24). Prior to sentencing, appellant lodged a pro se appeal with this Court, which appointed the undersigned as counsel in this appellate proceeding (R. 30). On January 24, 1969 the trial judge in the United States District Court sentenced appellant to 2-6 years imprisonment.[5]

2/ The language of Title 22 Section 2201 of the D. C. Code, as amended, has likewise been fully set forth (see page (v)).

3/ The Grand Jury indictment charged four separate counts which need not be repeated here. The particulars of each count are detailed in Footnote 7, infra.

4/ Where appropriate, citation is made to the record in the docket associated with this case ("R. _"), or to the transcript of the trial proceedings ("Tr. _").

5/ On January 24, 1969, appellant was also sentenced to a year's confinement for violation of parole. That conviction has been appealed separately. See Antonio R. Garcia v. United States of America, Case No. 22878. With the consent of the undersigned counsel, appellant has requested that this case and Case No. 22878 be consolidated and his appeal prosecuted by counsel appointed in this proceeding.

Appellant is now confined at Lorton Reformatory awaiting disposition of this appeal.

Questions Presented

1. Was the appellant unlawfully convicted of grand larceny and second degree burglary because of evidence obtained from the lodgings of a purported accomplice by law enforcement officers who had no search warrant and who entered without the permission of the purported accomplice?

2. Was the appellant prejudiced by admission into evidence of testimony of a law enforcement officer concerning an alleged offense[6/] not properly before the jury?

3. Under the circumstances of this case, was the appellant effectively deprived of his Constitutional right to effective representation of counsel through (a) the failure of the government to provide discovery

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6/ See footnote 5, supra.

information, and (b) failure to grant appellant's repeatedly expressed request to have another attorney appointed to represent him in the trial at issue?

4. Was the cumulative effect of instructions to the jury prejudicial to appellant with particular reference to (a) the weight to be given to the testimony of an accomplice, and (b) flight of an accused as an element of intent?

This case has not been before this Court previously.

Statement Of The Case

On April 23, 1968, the Grand Jury returned a four count indictment 7/ against Donald F. White and Antonio R. Garcia, appellant herein (R. 1).

7/ The indictment reads as follows (R. 1):

"FIRST COUNT:

On or about January 5, 1968, within the District of Columbia, Donald F. White and Antonio R. Garcia entered the dwelling of Caro E. Luhrs and Sandra L. Mink, with intent to steal property of another.

SECOND COUNT:

On or about January 5, 1968, within the District of Columbia, Donald F. White and Antonio R. Garcia stole property of Caro E. Luhrs and Sandra L. Mink, of the value of about $265.00, consisting of the following: three radios of the value of $50.00, two blankets of the value of $20.00, one watch of the value of $15.00, one camera of the value of $10.00, one ring of the value of $5.00, and one hair dryer of the value of $5.00, property of Caro E. Luhrs; and one

(Cont'd)

On March 8, 1968 a warrant for arrest of appellant was issued by the United States Commissioner in the United States District Court of the District of Columbia. The offense charged therein was violation of Title 18 Section 1073 of the United States Code, as amended, unlawful flight to avoid prosectuion.[8] There was no mention of grand larceny or second degree burglarly offenses in this warrant. On April

(Footnote 7 Cont'd)

television set and stand of the value of $75.00, two radios of the value of $10.00, two rings of the value of $25.00, one watch of the value of $25.00, and one vacuum cleaner of the value of $25.00, property of Sandra L. Mink.

THIRD COUNT:

On or about January 12, 1968, within the District of Columbia, Donald F. White and Antonio Gracia entered the dwelling of David Scott and Betty O. Scott with intent to steal the property of another.

FOURTH COUNT:

On or about January 12, 1968, within the District of Columbia, Donald F. White and Antonio R. Garcia stole property of David O. Scott and Betty O. Scott, of the value of about $3,875.00, consisting of the following: a quantity of jewelry of the value of $2,500.00, three fur coats of the value of $1,000.00, two radios of the value of $84.00, one hat of the value of $11.00, one pair of binoculars of the value of $45.00, one suitcase of the value of $45.00, one pistol of the value of $40.00, and one rifle of the value of $150.00, property of David and Betty O. Scott."

8/ The language of this provision of the United States Code is fully set forth elsewhere herein. See page (v).

11, 1968, appellant, who was at the time employed as a tree surgeon in Princeton, New Jersey, was ordered to be held for violation of 18 USC 1073 in the ~~United States District~~ Court for the District of New Jersey, Trenton, New Jersey. Bond was set at $5,000.00. Upon complaint filed by Special Agent Busche of the Federal Bureau of Investigation, charging unlawful flight to avoid prosecution [9/], appellant was ordered removed from the United States District Court for the District of New Jersey, Trenton, New Jersey and sent to the District of Columbia Jail. He has been confined ever since that time.

On July 8, 1968 an indictment was returned against White and appellant charging grand larceny and second degree burglary violations. Appellant pleaded not guilty to all four counts (R. 2). On July 26, 1968 the District Court appointed an attorney to represent appellant at his trial on the larceny and second degree burglary violations (R. 3). As yet, no attorney has been appointed to represent appellant on the violation of unlawful flight to avoid prosecution.

9/ Title 18, Section 1073, of the United States Code, as amended. See page (v), supra.

On July 17, 1968, the United States Commissioner issued a warrant for the arrest of White. This warrant was returned on July 26, 1968, together with the notation, signed by a United States Marshall, that White was being held in the D. C. Jail on another charge (R. 4). On August 16, 1968, White pleaded not guilty to all counts of the indictment (R. 6). Later, after retention of counsel, White withdrew his plea of not guilty to the four counts of the indictment and changed his plea to guilty to two counts of attempted burglary and petit larceny (R. 17).

In the meantime, appellant prepared and filed three pro se motions on August 30, 1968, September 3 and September 5, 1968 (R. 10-11). The first motion was for reduction of bond from $5,000.00 to $2,500.00 which was granted. The second motion was for a bill of particulars and discovery and other matters and was argued by counsel in the United States Court for the District of Columbia [10/] on September 27, 1968,

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10/ The Judge here was a different judge from the trial judge in appellant's case.

at which time appellant's pro se [11] motion for bill of particulars was granted by the District Court and the government was given two weeks to provide the information requested in appellant's pro se bill of particulars. Appellant's September 5, 1968 pro se (his third) motion to set 10% bond was denied after argument before the District Court. [12]

On November 7, 12, 13 and 14, appellant was tried before a jury and convicted on all four counts of the indictment (Tr. 1-508).

To establish that the value of the goods taken from the homes of Mr. and Mrs. Scott and Misses Luhrs and Mink exceeded $100.00, the government presented the testimony of Detective Walter A. Phillips of the Metropolitan Police Department (Tr. 138-159). Detective Phillips testified that on January 16, 1968, at 1:50 PM, he went to

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11/ Each of these three pro se motions on these four counts were prepared by appellant and argued by his court appointed counsel who had been appointed some six weeks before.

12/ The District Court Judge denying appellant's pro se motion to set 10% is not the same person who granted appellant's motion for bill of particulars or conducted the trial proceedings under review in this appeal.

premises at 1810 Kilbourne Place, N. W. in the company of Detective Owens of the Metropolitan Police Department. He testified that Detective Owens had a bench warrant for the arrest of Donald F. White, who had been indicted with appellant, but who was not on trial.[13/]

Detective Phillips testified that he and Detective Owens went to the front door of the house and were let in by a roomer of the house identified as appellant (Tr. 138-140). Detective Phillips testified that he and Detective Owens went up to the second floor where there were three rooms, that they learned from appellant where Mr. White's room was located, knocked on the door, tried to locate Mr. White through the transom, and the door was locked.

Detective Phillips testified that he and Detective Owens knocked again and could not get in and spoke to appellant and another person there on the second floor and asked if they had any keys whereupon keys were provided and they entered the

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13/ Donald F. White, the purported accomplice of appellant, pleaded guilty to attempted burglarly and to petit larceny on Counts One and Two of the indictment. Donald F. White later appeared as a prosecution witness and testified against appellant. More will be said of this later.

room of Donald F. White (Tr. 140-142). Detective Phillips testified that they did not find Mr. White in the room but that while in that apartment he and Detective Owens observed a closet with the door open where there were two furs hanging, that previously to going to that building they had occasion to be involved in the investigation of a burglary involving Mr. David Scott and was generally familiar with the description of many of the articles which had been taken from their home. Detective Phillips testified that his attention was drawn to the furs by the way that they were hanging and that he could see the initials inside the furs, E. J. S., which were the same initials reported by the Scotts on furs taken from their house.

Detective Phillips testified that he and Detective Owens apprehended Donald F. White across the street about five minutes after entering White's apartment (Tr. 142-144).[14/] Detective Phillips testified that in the course of looking through White's apartment, he went into another room and saw a shotgun case with the name Scott on it, opened the case and that there was a shotgun which was also reported in the

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14/ As far as can be determined, a search warrant for White's apartment was never obtained (Tr. 152).

Scott case, that he observed two radios of the same type that he knew had been taken in the Scott case in that room (Tr. 144-145).

The testimony of Detective James E. Owens was also given as a part of the direct case of the government (Tr. 296-317). He testified that he and Detective Phillips transported items taken from Mr. White's room to a police precinct where they were turned over to a Detective Lee of the Metropolitan Police Force (Tr. 300). It was his testimony that Donald F. White was arrested approximately 10 to 15 minutes after Detectives Phillips and Owens made entry into White's apartment. He testified that during that time he searched the trash can and found other slips of papers with an address, 1813 Kilbourne Place, where Mr. White was apprehended, and that he arrested White running out of the back door of the premises at 1813 Kilbourne Place (Tr. 302-303). He testified that Detective Marvin Lee secured a warrant for the arrest of appellant on January 26, 1968 (Tr. 307).[15/]

15/ The record in this case reveals no mention of a warrant for the arrest of appellant, dated January 26, 1968, nor is there any record of a warrant for the arrest of appellant for second degree burglary and grand larceny offenses.

Donald F. White, the purported accomplice of appellant, testified as a witness for the prosecution.[16] White's testimony is the only evidence directly connecting the appellant to any of the offenses for which he was indicted. No one else could testify to placing appellant at the scene of the crime. No fingerprint or other expert

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16/ At this point, it should be mentioned that in appellant's pro se motion for bill of particulars and for discovery and inspection of records, dated September 3, 1968, he requested the government to produce the statement of co-defendant, copies of papers and documents seized or taken from the co-defendant that implicated appellant, other such information seized or taken following the arrest of the appellant, and also such material which had been seized or taken following the arrest of the co-defendant which would be relevant to the defense of the appellant. As previously indicated, appellant's motion was argued before the District Court and granted on September 30, 1968, at which time the Court ordered that such materials be produced within two weeks. On October 21, 1968, appellant's court appointed counsel advised that the statements and materials which had been the subject of the Court Order were overdue. These materials and statements had still not been provided to appellant's court appointed trial counsel when the trial commenced on November 7, 1968 (Tr. 5-7). The prosecution indicated that the statements by appellant had not been reduced to writing, but that he had informed appellant's court appointed trial counsel of the substance of these statements. The prosecution stated that the appellant had made no written admissions but oral statements which had been made would be put into writing; it was indicated that the police summaries of these statements related to other pending investigations which were confidential in nature, and that the prosecution would not make these summaries available, but rather, would excise portions of these summaries pertinent to appellant's defense and make them available to appellant's court appointed trial counsel (Tr. 7-10).

analysis directly connected appellant to possession of any of the many items purported to have been stolen by him. Accordingly, inasmuch as the testimony of White is uncorroborated as to appellant, it is of critical significance in this case.

Donald F. White, who was 19 at the time of his testimony in this case, stated that appellant had persuaded him to live at 1810 Kilbourne Place, N. W., and that he had moved there on about December 29, approximately five or six days after having given up an address which he had had in New York for about one month (Tr. 169-171, 173). White testified that he had been engaged in housebreaking off and on for a period of about two years (Tr. 174-175), and that appellant had suggested that he (White) move to Kilbourne Place; that thereafter appellant discussed with him housebreaking opportunities (Tr. 178-179).

White testified that appellant had spoken of a place which he knew would be unoccupied, that appellant mentioned a red Ford truck used in the tree nursery business which would provide a "front" for their housebreaking

activities (Tr. 180-181). White testified that appellant had told him that he (appellant) could use the tree-cutting business as a means to watch houses (Tr. 183-184).

White testified that appellant drove White in a red truck to a house which was pointed out to White by appellant, that using a screwdriver, White gained entry to this house through the back door, that by prearranged signal appellant was given entry and that together they took several items from the house, put them on the truck, and that appellant drove the truck to 1810 Kilbourne Place, where most of the items were placed in White's room (Tr. 193-206). White further testified that appellant drove him in a green Volkswagen obtained from their landlord to a house into which White gained entry using a screwdriver, that the same prearranged signal was used to admit appellant into this house, and that White and appellant took a number of items from this house, placed them in the Volkswagen, and returned to 1810 Kilbourne Place, with appellant as the driver. Most of the items obtained were kept in White's room (Tr. 213-231). White identified furs shown to him by counsel for the prosecution as items taken from the

Scott premises (Tr. 234-236).

On cross-examination, White testified that there had been an occasion when he had become angry at appellant and had tried to break appellant's door down; that he had taken a knife and banged through the wooden door with the knife and made holes in the door, and that he was not under the influence of alcohol at this time (Tr. 253-254). White testified that at the time he was picked up by the police he had thought appellant had turned him in (Tr. 255). White testified that he had pleaded guilty in October, 1968, on three counts of attempted housebreaking and three counts of larceny (Tr. 249). White testified that nothing had been promised him, nor did he expect to get a lighter sentence with respect to the counts of housebreaking and larceny to which he had pleaded guilty (Tr. 257). White testified that he had been put on bond approximately four weeks before trial, but that the bond had been revoked (Tr. 273).

As a part of its direct case, the prosecution adduced testimony from Herbert M. Wanamaker, a detective with the Metropolitan Police (Tr. 324-329). Detective Wanamaker

testified that he had met appellant on April 15, 1968, in Princeton, New Jersey, at which time appellant was in the custody of United States Marshalls pursuant to an arrest warrant for unlawful flight to avoid prosecution, and that Detective Wanamaker transported appellant back to the District of Columbia.

Appellant took the stand in his own defense (Tr. 336-449). Appellant stated that he was born in Mexico in 1937, that he attended school there, that he first entered the United States in 1952, whereupon he became employed in the tree service business. Appellant testified that he worked for six years for a Mr. Kelly in the tree surgery business, and that thereafter, he worked for the Department of the Interior in the same line of employ (Tr. 339-340), that since 1960 he had been in business for himself, that he had registered with the Better Business Bureau and was listed in the phone book, and that he had enough customers to keep him going (Tr. 341-342). Appellant testified that in 1967 six persons were working for him on a salary basis (Tr. 343). Appellant testified that he first met White in the early part of 1967 at D. C. Jail, that White had approached him for a job late in 1967 after he had been

released from jail, and that White approached him on a third occasion when he (White) was out on bond; that White came to work for appellant in the early part of 1968. Appellant stated that White had asked him for a job because White was on bond and needed to show that he had a job (Tr. 343-348). Appellant emphasized that his tree surgery business was a legitimate one, and he denied that he had ever told White that it could be used as a cover-up for housebreaking (Tr. 348-349).

Appellant further testified that he and White and a third party by the name of Tony Garcia ~~had gone out~~ on appellant's truck for tree surgery jobs; that the other Tony Garcia was shorter then appellant and that he did not speak very good English, since he was from San Salvadore (Tr. 348-351). Appellant stated that he, White, and the other Tony Garcia went to visit a client of appellant who lived around the corner from Miss Luhrs and Miss Mink, that the other Tony Garcia was driving, and that appellant had the truck stopped so that he could visit a customer. Appellant stated that he advised the other Tony Garcia and White that he would be at least 40 minutes with this client, that he requested to be picked up by them at that time, and

that when the other Tony Garcia and White returned there was a bundle and some blankets in the back of appellant's truck; that the other Tony Garcia was speaking in excited Spanish language (Tr. 351-355). He testified that White does not know how to drive, and that the other Tony Garcia was driving the truck, that they proceeded to Kilbourne Place, whereupon the material in the back of the truck was unloaded and taken to White's room by either White or the other Tony Garcia (Tr. 354-356).

Appellant further testified that he wanted to do nothing further with White, and he refused to take White out on other occasions, because he feared that White might hurt his customers (Tr. 356-357). Appellant testified that he had nothing to do with the housebreaking on Barnaby Street [17/], that while he had borrowed a green Volkswagen, it had been driven by the other Tony Garcia on the occasion of the breaking into the Scott house on Barnaby Stree, and that appellant had never entered the house on Barnaby Street (Tr. 357-359).

17/ This is the residence of Mr. and Mrs. Scott.

On cross-examination by counsel for the prosecution, appellant corroborated previous representations (Tr. 374-376, 378, 385-388, 401-403). He stated that the other Tony Garcia was in the country illegally (Tr. 409), that the other Tony Garcia brought stolen goods to appellant's room (Tr. 414). Appellant consistently denied any complicity in the alleged entries into the homes of the Scotts and the Misses Luhrs and Mink.

The instructions given by the Court to the jury included the admonition that in weighing the testimony of a defendant, the jury could consider the fact that the defendant has a vital interest in the outcome of the trial (Tr. 486), and that the testimony of an accomplice should be received with caution and scrutinized with care (Tr. 487), with no explanation as to why the testimony of an accomplice should be so received and scrutinized.

Summary Of Argument

I

This is a case which is based largely upon circumstantial evidence. The appellant would never have

been convicted of either count of grand larceny were it not for the testimony of detectives as to the presence of goods which were discovered in the lodgings of Donald F. White, the purported accomplice of appellant. Law enforcement officers never obtained a search warrant for the White premises. They had no actual or apparent authority to enter White's lodgings. All of this evidence is inadmissible because it was illegally obtained. Accordingly, appellant cannot be convicted of grand larceny.

II

As a part of its direct case, the government presented a law enforcement officer who testified about bringing the appellant back from Princeton, New Jersey, where appellant had been arrested and placed in custody for unlawful flight to avoid prosecution. These events took place more than three months after the alleged offenses for which appellant was on trial. The effect of introduction of this testimony was prejudicial to appellant.

III

The uncorroborated testimony of the purported accomplice, White, was critical in this case. The government did not comply with a Court Order requiring production of written summaries and admissions in the possession of

the government which were essential to preparation of an adequate defense. Further, appellant had requested appointment of another trial counsel. Appellant had alleged that his court appointed counsel at trial consulted with him for a total of only ten minutes during the time from June to November, 1968. There is no indication that this allegation has been contested.[18/] As the testimony at trial brought out, there was another Tony Garcia living at 1810 Kilbourne Place, N. W. Witnesses might have been called by the defense to corroborate appellant's testimony about the other Tony Garcia. Appellant's allegations about consultations with court appointed trial counsel must be taken at face value, since they are uncontroverted as far as can be determined. The cumulative effect of these two facts is to deprive appellant of effective representation of counsel.

IV

The trial court instructed the jury that in weighing the testimony of appellant it could consider that he had an

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18/ The D. C. Jail keeps no records of visits by attorneys to persons confined therein; accordingly, there is no means of corroborating or refuting allegations made by appellant in this regard.

interest in the outcome of this proceeding. As to the purported accomplice, White, the Court instructed that the weight given to his testimony should be received with caution. Because of the closeness of this case and the extremely circumstantial nature of the evidence, the trial court should have given explanation as to the reason for receiving the testimony of an accomplice with caution. Further, the court instructed the jury that it could consider evidence of flight as tending to prove the defendant's consciousness of guilt; under the circumstances, there should have been an instruction that the time of the purported flight should be considered by the jury in weighing whether the flight is related to the purported offense. The cumulative effect of these instructions was prejudicial to appellant.

Argument

I

The evidence at trial clearly shows that the law enforcement authorities had no search warrant to obtain evidence from the lodgings of Donald F. White. White's room was locked when the law enforcement officers entered. There

is evidence that law enforcement officers rummaged through a trash receptacle to obtain an address at which they could apprehend White. This is indication that the intent of the law enforcement officers was to search White's lodgings and not to arrest him. This intent is borne out by the fact that evidence obtained from White's lodgings was removed by law enforcement officers without a search warrant and without the permission of White.

It is well established that a search is not to be made legal by what it turns up. In law it is good or bad when it starts and does not change character from its success. United States v. DiRe, 332 U.S. 581, at 595. Generally, all searches and seizures without a warrant judicially issued on a showing of probable cause are unreasonable and evidence thus obtained is inadmissible against the accused, notwithstanding facts unquestionably showing probable cause. United States v. One 1957 Ford Ranchero Truck, 265 F. 2d 21; United States v. Lerner, 100 F. Supp. 765. Cf. Morrison v. United States, 104 U.S. App. D.C. 352, 262 F. 2d 449. Entry

is lawful or unlawful at the time at which made, and subsequent search has the same legal character as the entry which made it possible.

Appellant is well aware of the line of cases which holds that material in "open view" cannot be ignored when discovered as an incident of a lawful arrest. Such is not the case here. The evidence obtained from White's lodgings was not obtained as an incident of lawful arrest. White was not arrested; he was not even present at the time. No one had express or implied or apparent authority to admit the law enforcement officers to White's lodgings. Accordingly, the search of White's rented premises without a search warrant is unconstitutional. See Chapman v. United States, 365 U.S. 610, 81 S. Ct. 776, 5 L. Ed. 2d 828, where the Supreme Court held that even with consent of a landlord, a search of a rented room without a search warrant was unlawful. See also Work v. United States, 100 U.S. App. D.C. 237, 243 F. 2d 660; Worthington v. United States, 166 F. 2d 557.

The testimony clearly shows that the arrest of White was an incident of a search of his lodgings conducted

without a warrant and without his permission. He was not even in the premises. It was error to admit the fruits of this illegal search into evidence. James v. State of Louisiana, 382 U.S. 36, 86 S. Ct. 151, 15 L. Ed. 2d 30, Jones v. United States, 357 U.S. 493, 78 S. Ct. 1253, 2 L. Ed. 2d 1514; Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081. No search warrant was ever produced, nor was the failure to produce one explained or accounted for. In fact, the record clearly shows that the only warrant for the arrest of White was returned several weeks after January of 1968, when the search took place, and said warrant was returned with the notation that White was already incarcerated for another offense.

This Court has held that where there was no search warrant and no arrest and no exceptional circumstances warranting the obtaining of evidence without a warrant, the testimony of a law enforcement officer as to observations prejudicial to defendant should have been suppressed. Williams v. United States, 105 U.S. App. D.C. 41, 263 F. 2d 487. Where there is opportunity to obtain a search warrant and no explanation for the failure to do so and where the government has

failed to establish true consent free of duress and coercion any evidence obtained from a warrantless search is inadmissible. Rigby v. United States, 101 U.S. App. D.C. 178, 247 F. 2d 584; Accarino v. United States, 85 U.S. App. D.C. 394, 179 F. 2d 476. This is in keeping with the holding that courts must scrutinize closely the testimony in cases involving warrantless arrests and seizures. Rouse v. United States, 123 U.S. App. D.C. 348, 359 F. 2d 1014.

II

Appellant respectfully submits that it was prejudicial for the prosecution as a part of its direct case to proffer the testimony of a United States Marshall who stated that he had gone to Trenton, New Jersey, for the purpose of accompanying appellant back to Washington to face charges of unlawful flight to avoid prosecution. The jury was made well aware of the fact that appellant had been arrested in New Jersey and was awaiting removal to the District of Columbia. However, it is respectfully submitted that the

time span [19] between the alleged offenses and the time of transporting appellant back to Washington was of such length that there could be no meaningful connection established between the offenses alleged and appellant's presence in New Jersey. Generally, evidence of offenses other than that for which the accused is on trial is inadmissible. Witters v. United States, 70 U.S. App. D.C. 316; Boyd v. United States, 142 U.S. 450, 12 S. Ct. 295, 35 L. Ed. 1077. There is valid reason for this precept. It is inconsistent with the traditional concept of fair trial to permit introduction of any evidence which might influence the jury to convict the defendant for any reason other than his guilt of the specific offenses with which he is charged. United States v. Harris, 331 F. 2d 185; Sang Soon Sur v. United States, 167 F. 2d 431.

A defendant is entitled to be tried upon competent evidence and only for the offenses charged, however full of crime his past life may have been. United States v. Dressler, 112 F. 2d 972; Kraft v. United States, 238 F. 2d 794. Generally,

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19/ The alleged offenses took place in January of 1968; appellant was transported from New Jersey to the District of Columbia on April 15, 1968.

the placing before the jury of evidence of other crimes committed by the defendant constitutes prejudicial error. Osborne v. United States, 351 F. 2d 111.

The inquiry into a collateral crime unconnected with the offense alleged is prohibited, especially so as to acts subsequent to those for which a defendant may be on trial. Hubby v. United States, 150 F. 2d 105, Horton v. United States, 256 F. 2d 138.

Appellant recognizes the position of the government that it attempted to establish flight as an incident of the offenses alleged.[20/] Assuming, arguendo, that this is proper, the tendency to arouse the prejudice of the jurors simply cannot be ignored. Powell v. United States, 347 F. 2d 156, United States v. Klein, 131 F. Supp. 807.

III

The right to access of material through the discovery process has been codified in the Federal Rules of Criminal

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20/ For reasons which will be set forth hereinafter, appellant respectfully submits that the submission to the jury of an instruction relating to flight from the jurisdiction was prejudicial under the circumstances in this case.

Procedure. See Rules 7(f), 16(a), and 16(b). The recent trend of cases has been to provide effective counsel at critical stages of the criminal process. Hamilton v. Alabama, 368 U.S. 52, 82 S. Ct. 157 (1961), 7 L. Ed. 2d 114; Miranda v. Arizona, 384 U.S. 436, 186 S. Ct. 1602 (1966), 16 L. Ed. 2d 694; United States v. Wade, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149; Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967 (1967), 18 L. Ed. 2d 1199. The objective of these decisions, all of which deal with constitutional right to counsel, would be seriously undercut if the accused is deprived of assistance of counsel which necessarily includes consultation and understanding of the accused's case before trial and consideration of his special interest in cross-examination.

Appellant was deprived of the opportunity to prepare adequate defense through failure of the government to comply with the Court mandate requiring production of discovery information. Further, in light of the uncontradicted allegation of appellant that he had not had sufficient opportunity to confer with court appointed trial counsel, a

hearing should have been conducted at the trial court level in order to assure the safeguarding of appellant's rights. See, in this connection, Gray v. United States, 112 U.S. App. D.C. 85, 299 F. 2d 467, where such a procedure was followed.

IV

The courts have expressed considerable doubt about admission into criminal trials of evidence that the accused had fled the scene of an actual or supposed crime; there are indications that the probative value of such evidence is of minimal, if any, impact. Allen v. United States, 164 U.S. 492, 498-499; Hickory v. United States, 160 U.S. 408, 416-421. It is respectfully submitted that the trial court should not have submitted to the jury an instruction on flight.

Further, this Court has recognized that the testimony of an accomplice is less likely than other evidence to be true. See Matthews v. United States, 115 U.S. App. D.C. 339, 319 F. 2d 740; Bishop v. United States, 100 U.S. App.

D.C. 88, 243 F. 2d 32 (1957); McQuaid v. United States, 91 U.S. App. D.C. 229, 198 F. 2d 987. The judicial reservations about the weight to be given to the uncorroborated testimony of an accomplice should have been more clearly spelled out to the jury. The public policy reasons for this are apparent. Particularly is this so when, as to the apparent jury was advised that it could consider his self-interest in the outcome of the trial proceedings.

It is respectfully submitted that such instructions have a sort of abstract quality which is not sufficiently related to the complicated valued judgments which must be made by the jury. See, in this connection, United States v. Gay, ____ U.S. App. D.C. ___, Case No. 21,916, Decided March 18, 1969, Slip Opinion, Page 5.

Finally, some mention must be made of the decision of this Court in the case of Scott v. United States, ___ U.S. App. D.C. ___, Case No. 20,954, Decided February 13, 1969, where the Court recognized the public policy problems attendant to plea bargaining and differential sentencing. The

attention of this Court is respectfully invited to the fact that when Donald F. White, who had an extensive criminal record, was sentenced on December 13, 1968, the Court recommended commitment to a location other than in the vicinity of the District of Columbia. The Court's attention is also invited to the attached medical report, which indicates that White was sexually assulted during a disturbance at the D. C. Jail on the night of September 30, 1968; thereafter, White was released on bond, but fled the jurisdiction and was rearrested in New York after having violated conditions of his release, was returned to Washington just prior to commencement of appellant's trial. The testimony at trial contains instances in which White had shown hostility and even aggression towards appellant; White had reason to believe that appellant had "turned him in". All of these matters should have been brought to the attention of the jury because of the critical importance given by the jury to the testimony of White.

Conclusion

WHEREFORE, the foregoing considered, it is respectfully submitted that appellant's conviction be vacated, that

this case be remanded for further proceedings, or that this Court grant such other relief as may be consistent with advancement of sound administration of justice.

Respectfully submitted,

Joseph F. Hennessey
Court Appointed Attorney
for Appellant

MED. 20

DEPARTMENT OF CORRECTIC[illegible]
DISTRICT OF COLUMBIA JA[illegible]
Medical Department

DAILY MEDICATION

NAME White, Donald   DCDC NO. 156 812

C B.

DATE	DIAGNOSIS	MEDICATION
Sept 30, 1968	Pt claims to have been beat up by some inmates in the yard and several inmates [illegible] he [illegible] pants were ripped off him. Pt embarrassed [illegible] crying.	
	B.P. 160/82 Pulse 96.	[illegible] check [illegible]
	[illegible] degree contusion [illegible]	
	laceration of face.	
	Also has contusion on [illegible] shoulders [illegible]	
	contusion area [illegible] right [illegible]	
	small laceration to right of arm [illegible] (right [illegible])	
	Head & Neck: Eyes PERLA no jaundice [illegible]	
	Nose & Cheeks: No [illegible] [illegible] contusion [illegible]	
	No tenderness [illegible]	
	Mouth: No laceration [illegible]	
	Neck: Supple	
	Chest: No pain on compression [illegible] contusion [illegible] [illegible] on left [illegible]	
	[illegible] contusion area [illegible] on right [illegible]	
	Lung fields normal [illegible] breath sounds.	
	No rales or [illegible]	
	Heart sounds of good quality — no thrill or murmur [illegible]	
	[illegible]	
	Abdomen: Tender in right flank area [illegible]	
	[illegible] No rigidity [illegible]	
	[illegible]	
	KLS not palpable	
	Rectal: [illegible] done for [illegible] [illegible] against [illegible]	
	[illegible] small split [illegible]	
	[illegible]	
	Extremities: Normal [illegible] Rectal Rape;	Multiple contusion [illegible]

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing BRIEF OF APPELLANT was mailed, postage prepaid, this 21st day of April, 1969 to Frank Q. Nebeker, Esquire, United States Attorney, United States Courthouse, Washington, D. C., 20001.

Joseph F. Hennessey
1819 "H" Street, N. W.
Washington, D. C. 20006
Court Appointed Attorney
for Appellant

REPLY BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 22,653

UNITED STATES OF AMERICA, Appellee,

v.

ANTONIO R. GARCIA, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

June 30, 1969

Joseph F. Hennessey
1819 H Street, N. W.
Washington, D. C. 20006

Attorney Appointed By
This Court

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA	:	
	:	
v.	:	Case No. 22,653
	:	
ANTONIO R. GARCIA	:	

REPLY BRIEF

Antonio R. Garcia, by his court-appointed attorney, herewith submits his reply brief in the above-captioned appeal.[1/]

Appellant has submitted four separate legal questions for consideration by this Court. Further discussion of each of these four points is appropriate in light of the opposition brief of the Appellee.

I.

Appellant contends that he was unlawfully convicted of grand larceny and second degree burglary because of evidence obtained from the lodgings of a purported accomplice by law

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1/ The undersigned has also been appointed counsel for Appellant in Case No. 22, 858, Probation Transfer Case No. 62, wherein Appellant is appealing a conviction for violation of probation. A Motion For Summary Reversal is being prepared in that appeal and will be filed in due course.

enforcement officers who had no search warrant and who entered without the permission of the purported accomplice. The opposition alleges that Appellant has no standing to raise a Fourth Amendment claim and that the Appellant failed to timely raise this issue below and is therefore foreclosed from raising it now for the first time on appeal.

A. Standing

The brief of the Appellee states that Appellant may properly invoke the Fourth Amendment to exclude illegally seized evidence only if he asserted either a possessory or proprietary interest in the objects seized or the premises searched. While recognizing that an Appellant who has a possessory interest in the goods seized may have standing to assert a Fourth Amendment claim, the presentation of the Appellee fails to address itself to the facts of this case.

It is respectfully submitted that the case of Jeffers v. United States, 88 U.S. App. D.C. 58, 187 F. 2d 498 (1950) and the line of cases cited thereunder are dispositive of the situation here. The Appellant had a possessory interest in the

goods seized by the law enforcement officers even assuming arguendo, that the possession was not lawful.

The theory of the Government's case belies its argument that the Appellant cannot claim standing to assert Fourth Amendment rights here. The Appellant has been charged with grand larceny, which in itself connotes wrongful possession of the goods of another. It is well established that the right to obtain exclusion of evidence does not depend upon the right to retain or repossess the evidence at issue. See Trupiano v. United States, 334 U.S. 699, 710; 68 S. Ct. 1229, 92 L. Ed. 1663 (1948); Agnello v. United States, 269 U.S. 20, 34, 46 S. Ct. 4, 70 L. Ed. 145 (1925). In fact, it should be noted that the Government relied in proving its case upon the testimony of a purported accomplice, Donald F. White, who stated that he had an agreement with Appellant to split the goods 50-50. (Tr. 238)

In short, the Government's theory of the case rests in part in the showing of a possessory interest, albeit an unlawful one, in goods purported to be taken by the Appellant.

The prosecution would subject Appellant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in Appellant's situation who is afforded the protection of the Constitution. See Jones v. United States, 362 U.S. 257 at 262 (1960).

Further, the argument as to standing set forth in the Brief of the Appellee should be considered in light of the following quotation from the Jones case, supra, at page 266:

> "We are persuaded, however, that it is unnecessary and ill-advised to import into the laws surrounding the Constitutional right to be free from unreasonable searches and seizures, subtle distinctions, developed and refined by common law in evolving the body of private property law which, more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. Even in the area from which they derive, due consideration has led to the discarding of these distinctions in the homeland of the common law."

The foregoing perceptive observation of Mr. Justice Frankfurter, who wrote the Opinion for the Court in the Jones case, simply cannot be ignored in consideration of the circumstances in which Appellant is found.

B. Timeliness In Raising Fourth Amendment Questions

The Government Brief contends that Appellant is foreclosed from raising Fourth Amendment questions before this Court because they were not raised at trial in the first instance. The short answer to this argument is that it ignores the mandate of Rule 52(b) of the Federal Rules of Criminal Procedure. See U. S. v. Harris, 388 F. 2d 373 (1967). The error committed here was plain, substantial, and prejudicial to Appellant. That the error was plain is implicitly conceded by the Appellee in its contention that if this Court determines that Appellant does have standing the case should be remanded to clarify the record.

II

The second major contention urged upon this Court by Appellant is that he was prejudiced by admission into evidence of testimony of a law enforcement officer concerning an alleged offense not properly before the jury. More specifically, the jury was informed that Appellant was transported from New

Jersey to the District of Columbia to face charges of unlawful flight to avoid prosecution. This was an alleged offense not ripe for consideration for the jury, which was determining the guilt or innocence of Appellant on other matters. In part, the Government disagrees with the contentions of Appellant herein because of the erroneous assumption that this point is raised for the first time on appeal. Such is not the case. Counsel at trial objected to evidence concerning flight because the accused was being tried for a crime for which he had not been indicted (Tr. 166-167). There has been no significant refutation of Appellant's argument that the testimony concerning purported flight of Appellant is not sufficiently related to the offenses for which he was tried to be admissible into evidence. This testimony was neither necessary nor proper.

III

The third point raised by the Appellant is that he was effectively deprived of his Constitutional right to meaningful representation of counsel through (a) the failure of the Government to provide discovery information, and (b) failure

to grant Appellant's repeatedly expressed request to have another attorney appointed to represent him at the trial. The latter two issues are deserving of consideration in light of the response of the Government.

A. Failure To Provide Discovery Material

It is respectfully submitted that the Government misperceives the thrust of Appellant's intentions concerning the failure to produce discovery material. Significantly, the Government does not dispute the factual recitation of Appellant with respect to the chronology of the requests for discovery materials. The principal point made here by the Appellant is that he should have been afforded the opportunity to be ready at trial and not after commencement of trial; the importance of this preparation is underscored because of the contention of the Appellant that another Tony Garcia was implicated in these illegal acts, not the Appellant.

B. Appellant's Request For Change In Counsel

The failure to grant the request of Appellant to have another attorney appointed to represent him in trial is not

raised for the first time here. Substantiation of this claim can be found in the miscellaneous papers associated with the jacket in Criminal Case No. 1010-68, filed in the Clerk's office of the United States District Court. Official notice is respectfully requested.

IV

The fourth principal assertion of Appellant herein is that, in essence, "boiler plate" instructions prepared by the Junior Bar Section are not necessarily tailored to fit the unusual circumstances present in this case. Specifically, Appellant contends that the framing of an instruction about testimony of an accomplice should have been more reflective of the circumstances at bar.

Moreover, as the Government concedes, the case of Luther Austin v. United States, U.S. Court of Appeals for the District of Columbia Circuit, Slip Opinion, decided May 27, 1969, clearly indicates that the use of a flight instruction essentially the same as the one in the instant case was erroneous. The reasons for finding the flight instruction

erroneous lend support to the contention that the instruction given to the jury with respect to accomplice's testimony as erroneous. In any event, insofar as the flight instruction itself is concerned, the principal contention of the Government is that the use of this instruction did not constitute plain error in the absence of an objection below. Here, of course, objection was made to the use of testimony concerning flight of the accused. Accordingly, this point is preserved on appeal. Finally, irrespective of the contention of the Government, it hardly seems conceivable that the Austin case precludes invoking the aid of Rule 52(b) where the giving of a legally erroneous flight instruction can be prejudicial to the rights of Appellant.

Conclusion

WHEREFORE, the foregoing considered, it is respectfully submitted that Appellant's conviction should be vacated,

that the case should be remanded for further proceedings, or that this Court should grant such other relief as may be consistent with the advancement of sound administration of justice.

Respectfully submitted,

ANTONIO R. GARCIA

By_____

Joseph F. Hennessey
1819 H Street, N. W.
Washington, D. C. 20006

June 30, 1969

CERTIFICATE OF SERVICE

I, Joseph F. Hennessey, hereby certify that a copy of the foregoing REPLY BRIEF was mailed, postage prepaid, this 30th day of June, 1969 to Robert P. Watkins, Esquire, United States Attorney, United States Courthouse, Washington, D. C., 20001.

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June 30, 1969